Supreme Court, U.S.
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No. 88-2024

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT N. FLORES.....*Petitioner*

vs.

THE UNITED STATES OF AMERICA.....*Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

WHETHER, UNDER A FEDERAL TORT CLAIMS ACT, ACTION PURSUANT TO 28 U.S.C. §1346(b) 2671-80 (1982), PETITIONER'S INJURIES AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AS A MATTER OF LAW SO AS TO MAKE PETITIONER FALL WITHIN THE WORKMEN'S COMPENSATION ACT OF COLORADO.

WHETHER THE UNITED STATES OF AMERICA WAS, UNDER A FEDERAL TORT CLAIMS ACT, ACTION PURSUANT TO 28 U.S.C. §1346(b), 2671-80 (1982), A STATUTORY EMPLOYER WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT OF COLORADO AS TO PETITIONER.

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This Court should grant certiorari and reverse the Tenth Circuit Court of Appeals and remand to the United States District Court for the District of Colorado because its decision as to scope of employment under the Workmen's Compensation Act of Colorado as it applies to a Federal Tort Claims Act, action pursuant to 28 U.S.C. §1346(b), 2671-80 (1982), is in conflict with decisions of the Colorado Courts in cases presenting the same issues. This Court should grant Certiorari and reverse the Tenth Circuit Court of Appeals and remand to the United States District Court for the District of Colorado because its finding that the United States of America was, under a Federal Tort Claims Act, action pursuant to 28 U.S.C. §1346(b), 2671-80 (1982), a

statutory employer for purposes of the Workmen's Compensation Act of Colorado is in conflict with decisions of the Colorado Supreme Court and other Federal Circuit Courts of Appeals decisions in cases presenting similar issues. The same issue presented in the instant case was not even addressed by the Tenth Circuit Court of Appeals in its decision. This issue presents an important question of federal law which has not, but should be, settled by this Court.

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IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1988

No. _____

ALBERT N.
FLORES.....*Petitioner*

vs.

THE UNITED STATES OF
AMERICA.....*Respondents*

**WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

ALBERT N. FLORES, the Petitioner, petitions for a Writ of Certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

On July 6, 1987, the United States District Court for the District of Colorado entered an Order granting Respondent's Motion for Summary Judgment and dismissing Plaintiff's Complaint. A

copy of the United States District Court Summary Judgment Order is reprinted to the Appendix to this Petition.

On March 15, 1989 the United States Tenth Circuit Court of Appeals entered its Order and Judgment affirming the Summary Judgment Order of the United States District Court for the District of Colorado. A copy of the Tenth Circuit's Order and Judgment is reprinted in the Appendix to this Petition.

JURISDICTION

The United States Tenth Circuit Court of Appeals issued its Order and Judgment on March 15, 1989. This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES

Federal Tort Claims Act, 28 U.S.C. §1346(b), 2671-80 (1982). Workmen's

Compensation Act of Colorado. Colorado Revised Statute §8-41-105(a) and (b); C.R.S. §8-48-101(1) and (2) (1973). See Appendix for pertinent text of all statutes.

STATEMENT OF THE CASE

Petitioner has worked for Hughes Aircraft since 1975 at the Aerospace Defense Facility ("ADF"), on a forty (40) hour per week basis, with a normal working day being from 8:00 a.m. to 5:00 p.m. with one (1) hour being free for lunch. The ADF is located at Buckley Air National Guard Base in Aurora, Colorado.

On December 29, 1982, Petitioner left the ADF to go to lunch. He slipped and fell twice on accumulated ice and snow in a parking lot owned and/or under the responsibility for care and maintenance of the Respondent. As a result of the two

slip and falls, Petitioner was injured. Specifically, his injuries occurred off of Hughes Aircraft premises and did not occur on premises provided by Hughes Aircraft for the benefit of its workers.

At the time of his injuries, Petitioner was on his own free time. Petitioner's one (1) hour lunch break was uncompensated time. Neither Hughes Aircraft nor Respondent received any benefit from Petitioner's lunch time activities. Further, Petitioner was directed by Hughes Aircraft not to discuss matters related to his work during lunch or after business hours while off the Hughes Aircraft premises due to the sensitive nature of his work.

On the date of the slip and fall in Respondent's parking lot, Petitioner's act of going to lunch, was for his own benefit

and not for the benefit of Hughes Aircraft. Petitioner was not with anybody work related. Petitioner did not have any meetings scheduled with other persons regarding his work. Simply, Petitioner's lunch hour had no connection whatsoever with his work.

Petitioner has never made application for workmen's compensation benefits. Petitioner never voluntarily elected nor did Petitioner ever want workmen's compensation benefits as his sole remedy or as any remedy with regard to his injuries. Petitioner never waived any other rights with regard to his injuries, including a civil action against the Respondent.

Accordingly, on December 28, 1984, Petitioner filed suit against Respondent in the United States District Court for

the District of Colorado. Petitioner seeks damages against the Respondent for personal injuries proximately caused by his slip and falls upon Respondent's property.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE TENTH CIRCUIT COURT OF APPEALS AND REMAND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO BECAUSE ITS DECISION AS TO SCOPE OF EMPLOYMENT UNDER THE WORKMEN'S COMPENSATION ACT OF COLORADO, AS IT APPLIES TO A FEDERAL TORT CLAIMS ACT, ACTION PURSUANT TO 28 U.S.C. §1346(b), 2671-80 (1982) IS IN CONFLICT WITH DECISIONS OF THE COLORADO COURTS IN CASES PRESENTING THE SAME ISSUES.

The District Court and the Court of Appeals both found that Petitioner, Albert N. Flores, suffered injuries arising out of and in the course of his employment so as to be covered under Workmen's Compensation, thus precluding his action against the Respondent, the United States

of America, under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b), 2671-80 (1982). The District Court and the Court of Appeals relied primarily on Stewart v. United States, 716 F.2d 755 (10th Cir., 1982), cert.denied, 469 U.S. 1018 (1984) in reaching their decisions. The determinations made in Stewart do not and should not be applied to this case.

As stated by the Court of Appeals in its Order and Judgment, the district court may not resolve material issues of fact on a motion for summary judgment. The court may not make credibility determinations, weigh evidence, or draw inferences from the facts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Its role is limited to determining whether there is a genuine issue of material fact, and, if not, whether the moving party is entitled

to judgment as a matter of law. Willner v. Budig, 848 F.2d 1032, 1033-34 (10th Cir. 1988). In reviewing a District Court's decision granting summary judgment, the court of appeals must review these decisions de novo, resolving all reasonable doubts about the facts in favor of the non-movant. Tackitt v. Prudential Insurance Company of America, 785 F.2d 1572 (11th Cir. 1985); SEC v. Belmont Reid and Company, Inc., 794 F.2d 1388 (9th Cir. 1986). Although there is no dispute as to the time and place of the injury to the Petitioner, the facts surrounding the circumstances of the injury and the special circumstances which would create a causal connection between Petitioner's injury and employment have not been resolved. These facts must be resolved in favor of Petitioner in a determination on

a motion for summary judgment. These facts are also important to show why the decision in Stewart is not applicable to this case and that Petitioner's injury did not arise out of and occur within the scope of his employment so as to be compensable under the Workmen's Compensation Act of Colorado (WCA).

The test for determining whether a particular injury is compensable under the WCA §8-40-101 et.seq., C.R.S. 1973, contains two distinct elements. Not only must the injury occur in the course of the employment, but it must also arise out of the worker's employment. Industrial Commission v. London and Lancashire Indemnity Company, 311 P.2d 705 (Colo. 1957). In London and Lancashire Indemnity Company, the Supreme Court held:

> An accident 'arising out of the employment' usually occurs in the course of such employment, and an accident

> which 'arises out of the employment' involves the idea of a causal relationship between the employment and the injury. The term 'in the course of' relates more particularly to the time, place and circumstances under which the injury occurred. The two terms are not synonymous, and under our act where the conjunctive conditions are opposed the claimant must meet both requirements.

London and Lancashire, supra, at page 707. (Emphasis added).

This Court similarly found that arising "out of" and "in the course of" are separate elements which must both be met in determining whether compensation should be awarded under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §90 et.seq. for an "accidental injury". U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, 455 U.S. 608 (1982).

With regard to whether Petitioner's injuries occurred during the course and in the scope of his employment, Petitioner has specifically stated:

> (a) My injury occurred off of my employer's premises and did not occur on the premises provided by the employer for the benefit of its employees.
>
> (b) The parking lot where the accident occurred and where my injuries were sustained is not under the exclusive control of Hughes Aircraft.
>
> (c) The parking lot where the accident occurred and where I sustained my injuries is owned by the United States of America and not Hughes Aircraft to the best of my knowledge, information and belief.
>
> (d) The parking lot where the accident occurred and where I sustained my injuries is used by other employers and employees at the ADF other than Hughes Aircraft and in addition to Hughes Aircraft personnel.
>
> (e) The parking lot where the accident occurred and where I sustained my injuries is available to be used by authorized civilian personnel or people, as well as the military, as well as other employers and employees of other people other than Hughes Aircraft.

(f) The premises where the accident occurred and where I was injured was not under the exclusive control of my employer, nor were the premises the place where my employer usually conducted his business.

With regard to whether Petitioner's injuries arose out of his employment, Petitioner has stated:

(a) At the time of my injury and accident on December 29, 1982, I was at lunch, away from my employer's premises and was on my own free time, for benefits to myself and not to my employer.

(b) During the time of my lunch hour at the time I was injured, I was not compensated for my one hour lunch break. I was never compensated for my lunch breaks.

(c) Hughes Aircraft provided a lunch facility at the Aerospace Defense Facility ("ADF") which was at my option to use.

(d) I had the option of eating at the ADF, at the dining hall or at any place I so chose to eat. At time, I would eat at restaurants in Aurora, sometimes go to shopping centers to eat and sometimes to the Beck Recreational Center.

(e) Neither Hughes Aircraft nor the United States of America received any

benefit from my own personal lunch time activities on the date of my accident - at the time I was injured.

(f) Neither Hughes Aircraft nor the United States of America ever dictated where employees or personnel were to go for lunch, that being the free choice of the person, including myself.

(g) On the date of my accident at the time I was injured, my lunch and lunchtime activities were in no way connected with my employment at Hughes Aircraft.

(h) Hughes Aircraft did not control the lunch hour nor the activities of its personnel as to where they would eat or what they would do for eating lunch.

(i) At the time of the accident, I was not with anybody that was work related and I did not have any meetings scheduled or meetings to be held with other persons regarding work during lunch. In fact, I had been instructed by my employer many times with regard to my work to 'leave it at the office, and leave it at work' and not discuss it either casually, indirectly, or directly, remotely, or otherwise due to the classification of the work. Accordingly, my lunch hour could have no connection whatsoever with my work and did not have any connection whatsoever with my work.

(j) The hour that I was taking and the activities during my lunch hour at the

time of my accident and at the time I sustained my injuries was solely for my own benefit and was of no benefit to my employer.

(k) My assignment at Hughes Aircraft was in Operations Planning and Systems Analysis, which involved planning operations, and analyses of the systems, how to do the work, when to do it, why to do the work, and the analyses of how well systems performed when it was done. This was never connected with any lunchtime activity, nor could it be.

(l) There was no causal relationship between my employment with Hughes Aircraft and my injuries.

In concluding that the Court's holding in Stewart should be applied to this case, and that Petitioner's injuries arose out of and in the course of employment even though outside working hours, the Court of Appeals stated:

> There is no reason to apply a different rule simply because Mr. Flores' injury occurred during the lunch hour, while he was on route to an employer-provided cafeteria. (Emphasis supplied)

There has been no stipulation that Mr. Flores was en route to an "employer-

provided cafeteria", and in fact, this was not the case[1]. The analysis as to whether Petitioner's injury arose out of and occurred within the scope of his employment must proceed accordingly.

From the facts set forth above, it is also clear that the special circumstances surrounding the Petitioner's employment were clearly different than those of the injured employee in Stewart, in that Petitioner was specifically instructed by his employer with regard to his work to "leave it at the office, and leave it at work" and not to discuss it either casually, indirectly or directly, remotely

---

[1] In fact, the U.S. Attorney was so concerned about the erroneous "finding" of the trial court on this issue of "employer provided cafeteria" that he wrote a letter to the trial judge trying to get this "corrected" before an appeal ensued. It never was corrected and the Tenth Circuit failed to acknowledge it. See letter attached to Appendix.

or otherwise due to the classification of the work.

It has long been the rule in Colorado that injuries incurred while going "to and from work" are not within the scope of the WCA. Rogers v. Industrial Commission, 574 P.2d 116 (Colo.App. 1975). The Rogers case held that although a Denver policeman is required to always be on duty, an injury suffered while on his way to his place of employment was not within the scope of the WCA. Rogers, supra. In addition to the Rogers decision, the Courts have consistently held that off-premises lunchtime travel falls within the "to and from" work rule and is not compensable under the WCA. In Perry v. Crawford Company, 677 P.2d 416 (Colo. App. 1984), the Court of Appeals held that:

> For an injury occurring during such travel to fall within the scope of employment, there must be a sufficient

> nexus between the employment and the injury, i.e. there must be special circumstances reflecting a causal connection between the employment and the injury. Perry, supra at page 418.

When the totality of the circumstances surrounding Petitioner's injury and employment is considered, the conclusion is inescapable that a sufficient nexus is not present in the instant action. As noted from Petitioner's statements above, Hughes Aircraft did not insert itself into the lunchtime activities of the Petitioner and Petitioner was free to go anywhere of his choosing during his lunchtime.

Likewise, Mr. Flores was not compensated during his lunch hour and neither he nor Hughes Aircraft ever received any benefit from Petitioner's lunch breaks. As stated in Perry, supra at page 418, "there is nothing in the facts of the instant case which would distinguish claimant from the

multitude of other employees who daily leave their offices in search of lunch and which would bring him within the exception to the "to and from work" rule."

In Stewart, supra, the Court of Appeals in finding the special circumstances that created the causal connection between the employee's injury and employment, relied heavily on the fact that both the employer and employee benefitted from the parking lot in which the employee was injured, relying on Sieck v. Trueblood, 485 P.2d 139, 135 (Colo.App. 1971) and Bragger v. Kezer, 626 P.2d 700 (Colo.App. 1980). No such mutual benefit existed in this case, especially in light of the fact that Petitioner was not on his way to an employer-provided cafeteria as discussed above. At the very least, issues of material fact remain in this regard so as

to prevent the granting of a Motion for Summary Judgment.

This Court should grant certiorari and reverse the Tenth Circuit Court of Appeals and remand to the United States District Court for the District of Colorado because its finding that the United States of America was, under a FTCA 28 U.S.C. §1346(b), 2671-80 (1982) action, a statutory employer for purposes of the WCA is in conflict with decisions of the Colorado Supreme Court and other Federal Circuit Courts of Appeals decisions in cases presenting the same issues.

Even assuming, arguendo, that the Petitioner's injuries arose out of and in the course of his employment, the Respondent, United States of America, can not be construed as a statutory employer pursuant to the WCA and the Colorado cases

interpreting that Act. Under the FTCA, the United States of America's liability is determined in accordance with the law of the place where the injury occurred, in this case, Colorado. Richards v. United States, 369 U.S. 1, 10 (1962); Gammill v. United States, 727 F.2d 950, 953 (10th Cir. 1984). The WCA provides in pertinent part, C.R.S. 1973 §8-48-101(1) and (2), that:

> (1) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work shall be construed to be an employer as defined in Articles 40-54 of this Title and shall be provided in said articles to pay compensation for injury or death resulting therefrom to said lessee, sublessee, contractor, or subcontractors and their employees or employee's dependents. The employer, before commencing said work, shall insure and keep insured his liability as provided in said articles, in such lessee, sublessee, contractor, or subcontractor, as well as any employee thereof shall be deemed employees as defined in said

articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor and may withhold and deduct the same from the contract price or any royalties or other money due, owing or to become due from said lessee, sublessee, contractor or subcontractor.

(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in Articles 40-54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurers shall have any right of contribution or action of any kind, including actions under §8-52-108, against the person, company or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agent.

Employer is defined in C.R.S. §8-41-105(a).

It states:

(a) The state, and every county, city, town and irrigation, drainage, and school district and all other taxing districts therein and all public institutions and administrative boards thereof without regard to the number of persons in the service of any such

> public employer. All such public employers shall be at all time subject to the compensation provision of Article 40-54 of this title.

It has been the law in the State of Colorado for more than 50 years that a governmental entity cannot be a statutory employer pursuant to §8-48-101(1) C.R.S. 1973. See Antal v. Delta County Mesquito Control District Number 1, 644 P.2d 87 (Colo.App. 1982); State Compensation Insurance v. Alishio, 250 P.2d 1015 (Colo. 1952); and Industrial Commission v. State Compensation Insurance Fund, 29 P.2d 372 (Colo. 1934). A simple review of C.R.S. §8-48-101(1) 1973 reveals that a statutory employer is an entity that is made to be a constructive employer because of the existence of certain required circumstances as set forth in this section. Since the United States of America is a governmental entity, it

cannot be a statutory employer pursuant to C.R.S. §8-48-101(1) 1973. Clearly, pursuant to the long standing Colorado law, the Respondent, United States of America, cannot be a statutory employer pursuant to the WCA.

Even if the United States of America is not viewed as a governmental entity for purpose of the FTCA, it can still not, as a private person, be viewed as a statutory employer pursuant to Colorado law. Colorado case law has provided a two-part test to determine whether a company is a statutory employer.

> A company is not automatically a statutory employer under §8-48-101(1), C.R.S. 1973 (1982 Supplement) because it engages in contracted work, unless the work contracted out at the time of the injury is:
>
> > (1) A part of the normal business of the company contracting out such business; and

(2) Business which the company would ordinarily accomplish with its own employees.

Campbell v. Black Mountain Spurs, Inc., 677 P.2d 379 (Colo.App. 1983) at page 381. See also, Pioneer Construction Co. v. Davis, 381 P.2d 22, 24 (1963).

According to Campbell, and Pioneer Construction Co., Inc., supra, even if the United States of America could be a statutory employer, which the Petitioner believes it can not, it could only be a statutory employer if the work contracted out at the time of the injury was part of the normal business of the United States of America and was a business in which the United States of America would ordinarily accomplish with its own employees.

A strict, literal reading of the requirements set forth in the Colorado Court's interpretation of its own statute

must be followed. See Matthews v. United States, 825 F.2d 35 (4th Cir. 1987) wherein the Fourth Circuit Court of Appeals found that the United States was not a "statutory employer" within the meaning of Maryland Workers' Compensation Act, and was not immune from suit under the FTCA for injuries sustained by an employee of a corporation engaged in performance of a cost plus award fee government contract for the Department of Energy when she slipped and fell on an icy sidewalk maintained by the General Services Administration. Petitioner, in the instant case has specifically stated:

> I do know from my years of experience that this type of work covered by the contract, as I understand it, between the United States Air Force or the United States of America and Hughes Aircraft Company would not ordinarily be accomplished with the employees of the United States Air Force, meaning 'employees of the United States of America'. This is especially true since the United States Air Force and the

> United States of America does not have the experience or personnel to accomplish such work required by the contract, as I understand it. Further, I was not and am not an employee of the United States Air Force or the United States of America.

Petitioner's statement is uncontroverted evidence that one of the prongs of the two prong test to determine whether a company is a statutory employer has not been established by the Defendant. Clearly the United States of America has not satisfied this prong and therefore, cannot be a statutory employer pursuant to the statute.

The Fourth Circuit in Matthews, supra, stated that:

> The statutory employer concept, which is a feature of most workers' compensation statutes, is designed to prevent the unfairness which would occur when a general contractor subcontracts a major portion of its work to various subcontractors who are financial irresponsible and who do not carry workers' compensation insurance.

Similarly, in Colorado, the statutory intent behind the WCA is to prevent employers from evading compensation coverage by contracting out work instead of directly hiring the workmen. San Isabel Electric Ass'n v. Bramer, 182 Colo. 15, 510 P.2d 438 (1973). This policy is clearly inapplicable to the instant case since the work done by Hughes Aircraft Company is not even work which the United States would or could accomplish through its own employees. As such, the WCA has no application to the United States of America as a "private person" employer, in this instance.

Although this issue was clearly raised in the Brief of Appellant before the Tenth Circuit Court of Appeals, the Court completely sidestepped the issue, stating merely that:

> When a private person has contracted with another entity that has obtained workmen's compensation insurance for its employees, that person is exempted from liability as a statutory employer. C.R.S. §8-48-101(1), (2). Since the United States had contracted with the Hughes Aircraft Company, and Hughes had procured workmen's compensation insurance for its employees, the United States is likewise immune.

There is no mention of the fact that this work performed by Hughes Aircraft Company was not work which the United States of America would ordinarily accomplish with its own employees. As stated above, this issue was never addressed by the Court in this case.

In Griffin v. United States, 644 F.2d 846 (10th Cir. 1981), the Court found that:

> The affidavits and deposition presented to the district court make it clear that the work Capitol City had contracted to do--the moving of government office furniture--was 'necessarily inherent in and an integral part of' the trade or business of the GSA.

No such finding was made in the instant case, and as set forth above, was clearly not the case. In the other case relied on extensively by the Court of Appeals, Stewart v. United States, 716 F.2d 755 (10th Cir. 1982) cert.denied, 469 U.S. 1018 (1984), this issue was never raised, and therefore, was never addressed. Therefore, Stewart, supra, has no application to this issue as raised in the instant case.

In fact, Petitioner has been unable to locate any federal court case which has directly addressed the application of a WCA when the United States has contracted with a company to do work which its employees ordinarily do not and can not do. Under the strict, liberal nterpretation of the State Worker's Compensation Act as was taken in Matthews.

supra, the United States of America can not be construed as a statutory employer in such a case. It is, therefore appropriate that this issue be settled by this Court at this time.

CONCLUSION

The Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALBERT N. FLORES,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before MCKAY and BARRETT, Circuit Judges and JENKINS, Chief Judge

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

** Honorable Bruce S. Jenkins, Chief Judge, United States District Court for the District of Utah, sitting by designation.

The question in this case is whether the appellant, Albert N. Flores, suffered injuries arising out of an in the course of his employment so as to be covered under workmen's compensation, thus precluding his action against the appellee, the United States of America, under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80 (1982). Ruling on the United States' motion for summary judgment, the district court held that, based on disputed facts surrounding Mr. Flores' accident at the Buckley Air National Guard Base, Mr. Flores' injuries occurred within the scope of his employment and were compensable under Colorado Workmen's compensation statute. Since Mr. Flores' employer, the Hughes Aircraft Company, was a contractor

of the United States and carried workmen's compensation insurance, the district court concluded that under Colorado law the United States was immune from federal tort liability as a "statutory employer." We affirm.

Mr. Flores was employed by Hughes Aircraft Company to work on classified defense contracts at the Aerospace Defense Facility (ADF) located at the Buckley Air National Guard Base in Aurora, Colorado. On December 29, 1982, while on his lunch break, Mr. Flores slipped and fell in the ADF parking lot, damaging the bone in his hip. At the time of the fall, Mr. Flores was heading to a cafeteria operated by Hughes Aircraft for the benefit of its employees at the base. Mr. Flores was not required to eat lunch at the cafeteria nor was his lunch hour compensated. The

parking lot where he fell was available to both Hughes Aircraft employees and employees of other contractors at the ADF and was operated by the federal government. Mr. Flores was required to pass through two security checkpoints before entering the ADF. After his accident, the injury to Mr. Flores' hip[did not improve, and he was forced to take extended sick leave. During this time, Mr. Flores was compensated by a combination of his accrued sick leave and workmen's compensation benefits provided by Hughes Aircraft's insurer, The Hartford.

On December 28, 1984, Mr. Flores filed the instant action seeking to recover damages resulting from his injury under the FTCA. On January 29, 1986, several named defendants were dismissed for lack of jurisdiction, and the case proceeded against the United States. On June 6,

1986, the United States moved for summary judgment. The motion was referred to a magistrate, who recommended it be granted. The district court, Chief Judge Finesilver presiding, rejected the magistrate's recommendation, finding that material issues of fact remained. On March 13, 1986 the case was transferred to Judge Matsch. The United State hen renewed its motion for summary judg: .t, which the district court granted on July 6, 1987. Mr. Flores now appeals this order.

Mr. Flores raises three issues in this appeal. First, he contends that the district court resolved a material issue of fact when it concluded that his injuries occurred within the scope of his employment and that summary judgment was therefore improper. Second, he argues that the district court erred in finding that the

United States was a statutory employer under Colorado law because the term "employer" is not defined to include the federal government. Third, he asserts that the doctrine of "the law of the case" precluded the district court from granting a renewed motion for summary judgment which had been previously denied. We are not persuaded by these arguments.

As to Mr. Flores' first contention, we agree that the district court may not resolve material issues of fact on a motion for summary judgment. The court may not make credibility determinations, weigh evidence, or draw inferences from the facts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Its role is limited to determining whether there is a genuine issue of material fact, and, if not, whether the moving party is entitled

to judgment as a matter of law. Willner v. Budig, 848 F.2d 1032, 1033-34 (10th Cir. 1988). Mr. Flores asserts that throughout these proceedings, he has contested whether his injuries arose out of and occurred during the course of his employment, and that this raises a material issue of fact.

While the determination of whether an injury occurs within the scope of employment depends, in the first instance, on the facts and circumstances of the particular case, see Bennett v. Furr's Cafeterias, Inc., 549 F.Supp. 887, 890 (D.Colo. 1982); City and County of Denver School Dist. No. 1 v. Industrial Comm'n, 196 Colo. 131, 581 P.2d 1162, 1163 (1978), once the essential facts surrounding the injury are established, the ultimate determination of whether the injury falls within the scope of employment is a matter

of law. See e.g., Tolbert v. Martin Marietta Corp., 858 F.2d 1479 (10th Cir. 1988) (decided on summary judgment); Stewart v. United States, 716 F.2d 755 (10th Cir. 1982) (same), cert.denied, 469 U.S. 1018 (1984). In this case, there is no dispute as to how the accident occurred. The only issue is whether these facts lead to the legal conclusion that Mr. Flores' injuries occurred in the course of his employment. The district court was therefore not required to resolve a material issue of fact in order to rule that Mr. Flores' injuries were compensable under workmen's compensation.

Mr. Flores argues that, even if the facts surrounding the accident were undisputed, the district court's legal conclusions were in error. In this case, the district court determined that Mr.

Flores' injuries fell within the coverage of Colorado workmen's compensation statute, relying on this court's holding in Stewart v. United States, 716 F.2d 755. We agree. Stewart involved a nearly identical set of facts as are presented here. The plaintiff, an employee of a government contractor, was injured in the parking lot of the Rocky Flats nuclear weapons facility several minutes before he was to have reported to work. He was not being paid at the time and was not required to park in the lot. The lot was also used by other employees of government contractors at the facility.

In Stewart, we noted the many cases in which Colorado courts have recognized that an employee's injuries are covered under the statute even though the injury did not occur during working hours. Id. at 761-62.

In such situations, an injury arises out of and in the course of employment even though incurred outside of working hours if "special circumstances create a causal connection between the employee's injury and employment." Id. at 761. We concluded that the employer in Stewart benefited from the availability of the parking lot in which the employee was injured, and that his injuries were within the scope of his employment. There is no reason to apply a different rule simply because Mr. Flores' injury occurred during the lunch hour, while he was en route to an employer-provided cafeteria. See 1 A. Larson, The Law of Workmen's Compensation §15.51 (1985).

We are further persuaded that the district court's resolution of this issue was correct by the Colorado Supreme Court's

ruling in In re Tolbert v. Martin Marietta Corp., 759 P.2d 17 (Colo. 1988). In response to certain questions certified to it by this court, the Colorado court addressed whether damages for the rape of an employee by her co-worker while the employee was on her way to lunch were compensable under workmen's compensation. In assessing whether the employee's injuries arose out of her employment, the court applied a positional risk test. Under this test, "'[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed [the] claimant in the position where he was injured.'" Id. at 20 (quoting A. Larson, supra p. 5, §6.50 at 3-6). The court further noted that "[t]he mere fact that an employee is on

lunch hour does not prohibit worker's compensation coverage,...as long as the worker was at a place where the worker may reasonably be, at a time during which the worker is employed, doing what he or she may reasonably do." Id. at 22. The court concluded that an employee walking from a work station to an employer-provided cafeteria is doing what she may reasonably do in a place where she may reasonably be. Id. at 23. We are likewise convinced that under Colorado law, Mr. Flores was doing what he may reasonably do in a place he may reasonably be by walking from his workstation to the Hughes cafeteria. Consequently, the district court did not err in concluding that Mr. Flores' injuries arose out of an occurred in the scope of his employment.

Mr. Flores additionally argues that the district court incorrectly determined that the United States was a "statutory employer" under Colorado law and that his FTCA action was thereby prohibited by the exclusive remedy provision of Colorado's workmen's compensation statute. Under the FTCA, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674. Further, the federal government's liability is determined in accordance with the law of the place where the injury occurred, in this case, Colorado. Richards v. United States, 369 U.S. 1, 10 (1962); Gammill v. United States, 727 F.2d 950, 953 (10th Cir. 1984). Colorado's workmen's compensation statute provides that if an injury falls within its coverage, any other civil action

against an employer relating to the injury is barred. Colorado Rev. Stat. §8-43-104 (1986). This provision is based on the principle that, in electing to provide workmen's compensation coverage, the employer assumes a new liability without fault but is relieved of the risk of large damage verdicts. 2A A. Larson, supra, p. 5, §65-11 at 12-9 (1988). In addition, under Colorado law, when a private person has contracted with another entity that has obtained workmen's compensation insurance for its employees, that person is exempted from liability as a statutory employer. Colo. Rev. Stat. §8-48-101(1),(2). Since the United States had contracted with the Hughes Aircraft Company, and Hughes had procured workmen's compensation insurance for its employees, the United States is likewise immune. Stewart, 716 F.2d at 765;

cf. Griffin v. United States, 644 F.2d 846, 847 (10th Cir. 1981)(applying the same analysis under Kansas law).

Mr. Flores argues, however, that the United States cannot be a statutory employer because it is not an "employer" as that term is defined in the Colorado statute. See Colo. Rev. Stat. §8-48-105. This argument overlooks the language of the FTCA which provides that the United States is liable only to the extent a private person would have been liable under the same circumstances. See Stewart, 716 F.2d at 763. Thus, whether the federal government is included in the term "employer" is irrelevant, since the rights and liabilities of the United States are determined by reference to federal, not

state, law.[1] Giannuzzi v. Doniger Metal Prods., 585 F.Supp. 1306, 1309 (W.D. Pa. 1984).

We are likewise not persuaded by Mr. Flores' argument that he never elected to receive workmen's compensation and therefore he should not be precluded from bringing an action under the FTCA.

> The operative fact in establishing exclusiveness [of the workmen's compensation remedy] is that of actual coverage, not of election to claim compensation in the particular case.

---

[1] It seems fairly clear that the federal government was not intended to be included as an "employer" under the Colorado Workmen's Compensation Act, since the United States government's liability as an employer is governed by several federal workmen's compensation laws, e.g., United States Employees' Compensation Act, 5 U.S.C. §8101 (1982). Moreover, the power of the state to compel the federal government to participate in the state's workmen's compensation program appears questionable and, at a minimum, would be preempted by federal action in the field. See Giannuzzi v. Doniger Metal Prods., 585 F.Supp. at 1309.

> Even if the employee himself has never made application for compensation, his right to sue his employer at common law is barred by the existence of the compensation remedy. If the Compensation Commission has made a valid and unappealed award for compensation, this is res judicata on the issue of coverage, and is binding on the court...

2A A. Larson, supra p. 5, §65.14 at 12-15 (1988). Mr. Flores misconstrues the term "election" as referring to an employees' election to claim benefits, instead of the employer's election to provide them in accordance with the statute. See Colo. Rev. Stat. §§8-41-105(5), 8-43-104. Consequently, whether Mr. Flores ever chose to receive workmen's compensation benefits for this injury is immaterial.

Finally, we disagree with Mr. Flores' contention that "the law of the case" precluded the district court from entering summary judgment in favor of the United States after the earlier motion for summary

judgment was denied. The law-of-the-case doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power.'" Christianson v. Colt Indus. Operating Corp., 108 S.Ct. 2166, 2178 (1988) (citation omitted). A court has the power to address prior decisions of its own or of a coordinate court in any circumstances, although normally a court will do so only for cogent reasons. Id.; Arizona v. California, 460 U.S. 605, 618 n.8 (1983); United States v. Carson, 793 F.2d 1141, 1147 (10th Cir.), cert.denied, 479 U.S. 914 (1986). When a lower court has made an interlocutory ruling which it believes to be substantially erroneous, however, "the only sensible thing to do is set itself right to avoid subsequent reversal." Major v. Benton, 647 F.2d 110,

112 (10th Cir. 1981). The district court in this case did just that, and we conclude that its ruling was not in error.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURIAM

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-M-2431

ALBERT N. FLORES,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendants.

JUDGMENT IN A CIVIL CASE

Pursuant to the Memorandum Opinion and Order entered by the U.S. District Judge Richard P. Matsch on July 6, 1987,

IT IS ORDERED AND ADJUDGED that the Defendant's motion for summary judgment is granted and this civil action is dismissed. The defendant shall recover its costs upon the filing of a bill of costs within ten (10) days.

July 7, 1987.

BY THE COURT:

_____

JAMES R. MANSPEAKER, CLERK

JACOB GILMORE, DEPUTY CLERK

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-M-2431

ALBERT N. FLORES,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This is an action filed pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. and 28 U.S.C. §1346(b). The defendant moved for summary judgment on June 6, 1986 asserting derivative immunity as a statutory employer under the Colorado Workmen's Compensation Act, C.R.S. §8-48-101(2). On July 9, 1986, the plaintiff

filed an opposing memorandum brief and affidavit, attempting to raise factual issues. On July 30, 1986, Chief Judge Finesilver referred the motion to a magistrate for a recommendation. The magistrate held a hearing and took testimony. On November 17, 1986, the magistrate recommended granting the defendant's motion for summary judgment. The plaintiff then filed objections to the magistrate's recommendations on November 28, 1986, to which the government responded on December 24, 1986. Chief Judge Finesilver rejected the magistrate's recommendation on a finding that "crucial questions" of fact were present. The case was reassigned for trial. On March 24, 1987, the government renewed its motion for summary judgment. The plaintiff responded on April 21, 1987; the defendant replied

on April 30, 1987. From the affidavits presented, the following facts are not disputed.

Albert Flores injured his hip on December 29, 1982 when he fell in a parking lot on the Buckley Air National Guard Base. Mr. Flores fell while he was going to lunch on a regular lunch hour break from his employment with Hughes Aircraft Company, a contractor performing work at the Aerospace Defense Facility ("ADF") on the Buckley base. The parking lot is accessible to the military and to authorized civilian personnel. The base is a restricted military facility, not open to the public. Hughes Aircraft Company provided a lunch facility at the ADF but its employees were not required to eat there. Flores was walking to the Buckley dining hall at the time he was injured.

Hughes Aircraft carried workmen's compensation insurance for its ADF employees and the Hartford Insurance Company paid Flores $13,922.81 for medical benefits and $36,882.30 for lost income as a result of the accident.

Sections 8-48-101(1) and (2) of the Colorado Revised Statutes provide a statutory employer with derivative immunity from liability for injuries arising out of and in the course of employment with a contractor which has workmen's compensation insurance for that employment. Stewart v. United States, 716 F.2d 755 (10th Cir. 1982), cert.denied, 469 U.S. 1018 (1984), held that such derivative immunity is available to the United States in an action under the FTCA.

In Stewart, 716 F.2d 755, the plaintiff, an employee of Rockwell International

Corporation, a contractor at the Rocky Flats Nuclear Weapon Facility, was injured in a parking lot at the Rocky flats facility as he was exiting his car, having just arrived to begin work. In considering the plaintiff's contention that he was not acting in the course of his employment, the court concluded that the totality of the circumstances must be examined to determine if there is a sufficient nexus between employment and injury to say that the accident occurred within the scope of the employment. Id. at 761. Although the plaintiff was injured approximately twenty minutes before he was required to report to work, the court held that the plaintiff was acting within the course of his employment. The court stated that if there is mutual benefit from the employee's conduct for both the employee and the

employer, even though the benefit to the employer is slight, then there is an adequate connection between the injury and the employment to conclude that it occurred within the scope of employment. Id. at 762.

Flores vigorously asserts that his lunch hour was his own time. He states that he could leave the base at lunch time and that "Neither Hughes Aircraft nor the United States encouraged the use of the Buckley dining hall..." Plaintiff's Affidavit of July 9, 1986 at Paragraph 9. However, Hughes Aircraft did provide a lunch facility on the base for the use of its employees, and Flores was planning on using that facility on the day he was injured. Given that Flores only had one hour each day for lunch, the proximity of the Buckley dining hall enabled Flores to obtain lunch

and then return to work within the time allotted by his employer. Thus, the Buckley dining facility was of mutual benefit to Flores and Hughes Aircraft Company, such that Flores' injuries occurred during the course of his employment as defined by the Stewart court. Additionally, but for his employment with Hughes Aircraft Company, Flores would not have been at the Buckley base.

In its motion to renew the motion for summary judgment, the government also cites Woodruff v. United States, No. 85-K-1928 (D.Colo. March 16, 1987), a case closely analogous to Stewart, involving statutory employer immunity under section 8-48-102(2). Woodruff also supports the defendant's position. There, the plaintiff was employed by Mountain Bell and was injured at the Rocky Mountain Arsenal,

where he was on assignment repairing phone equipment. Mountain Bell had a contract with the Army to provide, install and maintain phone equipment on the Rocky Mountain Arsenal grounds. Mountain Bell maintained workmen's compensation insurance for the benefit of its employees. The court held that section 8-48-102(2) immunized the United States from suit.

Upon reflection, the factual questions in Chief Judge Finesilver's order do not prevent granting the second motion for summary judgment because they are not material to the applicability of the statutory employer doctrine. The dispositive facts are clear and undisputed. This court has disregarded the testimony taken by the magistrate because that hearing was procedurally irregular in considering a motion for summary judgment.

Upon the foregoing, it is

ORDERED that the defendant's motion for summary judgment is granted and this civil action is dismissed. The defendant will recover costs.

Dated: July 6, 1987

By the Court:

RICHARD P. MATSCH, JUDGE

Case Number: 84-M-2431

I certify that I mailed a copy of the attached to the following:

Dated: July 6, 1987

JAMES R. MANSPEAKER, CLERK

A. Gary Bell, Jr.
Bradley P. Pollock
26 W. Dry Creek Circle, Ste. 575
Littleton, Colorado 80120

James Winchester
Paul M. Ray
Assistant U.S. Attorneys
1200 Byron G. Rogers Federal Bldg.
1961 Stout Street
Denver, CO 80294

cc: Magistrate Abram

28 U.S.C. §2674. LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in

lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this Chapter.

(As amended Nov. 18, 1988, Pub.L. 100-694, §§4, 9(c), 102 Stat. 4564, 4567).

C.R.S. §8-48-101(1) and (2)

8-48-101. Lessor or contractor-out deemed employer - liability - recovery.

(1) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work shall be construed to be an employer as defined in Articles 40-54 of this Title and shall be provided in said articles to pay compensation for injury or death resulting therefrom to said lessee, sublessee, contractor, or subcontractors and their employees or employee's dependents. The employer, before commencing said work, shall insure and keep insured his liability as provided in said articles, in such

lessee, sublessee, contractor, or subcontractor, as well as any employee thereof shall be deemed employees as defined in said articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor and may withhold and deduct the same from the contract price or any royalties or other money due, owing or to become due from said lessee, sublessee, contractor or subcontractor.

(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in Articles 40-54 of this title, neither said lessee, sublessee, contractor, or subcontractor.

its employees, or its insurers shall have any right of contribution or action of any kind, including actions under §8-52-108, against the person, company or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agent."

C.R.S. §8-41-105(a) and (b)

8-48-105. **Employer.** (1) "Employer" means:

(a) The state, and every county, city, town and irrigation, drainage, and school district and all other taxing districts therein and all public institutions and administrative boards thereof without regard to the number of persons in the service of any such public employer. All such public employers shall be at all time subject to the compensation provision of Article 40-54 of this title.

(b) Every person, association of persons, firm, and private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, who has one or more persons engaged in the same business or employment, except as otherwise expressly provided in

articles 40-54 of this title, in service under any contract of hire, express or implied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-2431

ALBERT N. FLORES,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE UNITED STATES AIR FORCE, BUCKLEY AIR NATIONAL GUARD BASE, and THE AEROSPACE DEFENSE FACILITY,

Defendants.

AFFIDAVIT OF ALBERT N. FLORES

I, ALBERT N. FLORES, being of lawful age and being first duly sworn, depose and say:

1. That I was employed by Hughes Aircraft Company and had worked for Hughes Aircraft at Buckley Air National Guard Base since 1975. I never was an employee of the United States of America.

2. That I was injured in the parking lot on the 29th day of December, 1982.

3. My injury occurred off of my employer's premises and did not occur on the premises provided by the employer for the benefit of its employees.

4. That at the time of my accident and injuries, I was employed by Hughes Aircraft on a 40 hour per week job, with the normal working day from 8:00 a.m. to 5:00 p.m., with one hour free for lunch.

5. That at the time of my injury and accident on December 29, 1982, I was at lunch, away from my employer's premises and was on my own free time, for benefits to myself and not to my employer.

6. During the time of my lunch hour at the time I was injured, I was not compensated for my one hour lunch break.

I was never compensated for my lunch breaks.

7. Hughes Aircraft provided a lunch facility at the Aerospace Defense Facility ("ADF"), which was at my option to use.

8. I had the option of eating at the ADF, at the dining hall or at any place I so chose to eat. At time, I would eat at restaurants in Aurora, sometimes go to shopping centers to eat and sometimes to the Beck Recreational Center.

9. Neither Hughes Aircraft nor the United States encouraged the use of Buckley dining hall, which is where I was going to eat lunch at the time of my accident and my injuries on December 29, 1982.

10. Neither Hughes Aircraft nor the United States of America received any benefit from my own personal lunch time

activities on the date of my accident at the time I was injured.

11. On the date of the accident, I was going to eat alone.

12. Neither Hughes Aircraft nor the United States of America ever dictated where employees or personnel were to go for lunch, that being the free choice of the person, including myself.

13. The parking lot where the accident occurred and where my injuries were sustained was not under the exclusive control of Hughes Aircraft.

14. The parking lot where the accident occurred and where I sustained my injuries is owned by the United States of America and not Hughes Aircraft to the best of my knowledge, information and belief.

15. The parking lot where the accident occurred and where I sustained my injuries

is used by other employers and employees at the ADF other than Hughes Aircraft and in addition to Hughes Aircraft personnel.

16. The parking lot where the accident occurred and where I sustained my injuries is available to be used by authorized civilian personnel or people, as well as the military, as well as other employers or employees of other people other than Hughes Aircraft.

17. On the date of my accident at the time I was injured, my lunch and lunchtime activities were in no way connected with my employment at Hughes Aircraft.

18. Hughes Aircraft did not control the lunch hour nor the activities of its personnel as to where they would eat or what they would do for eating lunch

19. At the time of the accident, I was not with anybody that was work related and

I did not have any meetings scheduled or meetings to be held with other persons regarding work during lunch. In fact, I had been instructed by my employer many times with regard to my work to 'leave it at the office, and leave it at work' and not discuss it either casually, indirectly, or directly, remotely, or otherwise due to the classification of the work. Accordingly, my lunch hour could have no connection whatsoever with my work and did not have any connection whatsoever with my work.

20. The lunch hour that I was taking and the activities during my lunch hour at the time of my accident and at the time I sustained my injuries was solely for my own benefit and was of no benefit to my employer.

21. My assignment at Hughes Aircraft was in Operations Planning and Systems Analysis, which involved planning operations, and analyses of the systems, how to do the work, when to do it, why to do the work, and the analyses of how well systems performed when it was done. This was never connected with any lunchtime activity, nor could it be.

22. My acts at the time of my accident and injuries, namely going to lunch, were solely for my own benefit and not for the benefit of my employer.

23. There was no causal relationship between my employment with Hughes Aircraft and my injuries.

24. T premises where the accident occurred where I was injured were not under the exclusive control of my employer

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nor were the premises the place where my employer usually conducted its business.

25. As to the contract between Hughes Aircraft and the United States Government, I have never been furnished a copy of that contract but could probably review it and comment upon it if such were furnished. During the time that I worked for Hughes Aircraft at Buckley Air National Guard Base from 1975 to the time of my accident, I never had any understanding that workmen's compensation benefits were specifically required and/or covered in the referenced contract.

Further, affiant saith not.

//s// Albert N. Flores

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

The foregoing Affidavit was subscribed and sworn to before me this 9th day of July, 1986, by Albert N. Flores.

Witness my hand and official seal.
My commission expires: 10-18-88

//s// Karen E. Stone
26 W. Dry Creek Cir.
#575
Littleton, CO 80120

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-2431

ALBERT N. FLORES,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE UNITED STATES AIR FORCE, BUCKLEY AIR NATIONAL GUARD BASE, and THE AEROSPACE DEFENSE FACILITY,

Defendants.

AFFIDAVIT OF ALBERT N. FLORES

I, ALBERT N. FLORES, being of lawful age and being first duly sworn, depose and say:

1. I am the Plaintiff in the above-captioned action.

2. Certain workmen's compensation payments were made to me.

3. I have never voluntarily elected workmen's compensation benefit as my sole remedy or any other remedy in this matter.

4. I have never had the conscious intent to elect the compensation remedy.

5. I have never waived any of my other rights in this matter, including, but not limited to, suits against the United States of America.

6. I never filed a claim for compensation in this matter. I have never proceeded to file a claim with the Workmen's Compensation Division, or any other division.

7. I have never sought an administrative determination of my eligibility for statutory compensation, including workmen's compensation.

8. That after I was injured, and before I was represented by an attorney, agents

from the insurance company took the initiative to make all payments to me and I never exercised a conscious choice with regard to an election, as to any payment, benefit or compensation.

9. After I was injured and before I was represented by counsel, a representative from the insurance company showed up at my door, without solicitation or request by me, and offered insurance payments in this matter on a voluntary basis.

10. I believe that Hughes Aircraft Company filed a claim in this matter, and I never participated in the filing of the claim, nor made a conscious effort, nor had conscious intent to proceed with regard to filing a claim. That filing of a claim was the decision of Hughes Aircraft Company, and/or the insurance company.

11. I have not made a voluntary, intelligent and/or informed decision to accept workmen's compensation benefits in lieu of any other remedy, nor have I made a voluntary, intelligent and conscious decision to waive any other right which I have, all rights being specifically preserved and reserved to me.

12. Since I was not injured in the course of my employment nor in the scope of my employment, I do have alternative remedies available to me, as I understand it, other than the unsolicited workmen's compensation payments made. In the first instance, I was improperly influenced to be paid workmen's compensation benefits and never participated in the process to elect to be paid those benefits.

13. I did have and do have available to me the right to make elections to proceed

by suit against the United States of America. I have never waived that right.

14. The insurance agent contacted me after I was injured, and before I was represented by counsel. They told me not to worry, that they would make payments to me and that this was the appropriate procedure to follow. This was all done without my request, solicitation, and/or permission, especially since I never filed a claim for compensation, nor sought any administrative determination for eligibility for statutory compensation or engaged in other similar acts.

15. I understood at the time, and I understand now, that acceptance of payment benefits does not preclude me from pursuing claims for my injuries and other damages.

16. I have never at anytime understood that I was making an election limiting my

course of action by acceptance of benefits which were volunteered to me by either Hughes Aircraft Company or their insurance carrier.

17. Further, since the entire contract has not been provided to us, I cannot make a determination as to whether or not this work pertains to the United States of America, as to whether or not this work is "part of the regular business" of the United States of America. I do know from my years of experience that this type of work covered by the contract, as I understand it, between the United States Air Force or the United States of America and Hughes Aircraft Company would not ordinarily be accomplished with the employee(s) of the United States Air Force, meaning "employees of the United States of America." This is especially true since

the United States Air Force or the United States of America does not have the experience or personnel to accomplish such work required by the contract, as I understand it. Further, I was not and am not an employee of the United States Air Force or the United States of America.

18. At the time this accident occurred, I was asked by Hughes Aircraft representatives where I slipped and fell and after I so indicated the spot and location of my slip and fall involved in this litigation, I was told by a representative of Hughes Aircraft Company that Hughes was not responsible for that area.

19. At the time I was contacted by Steve McInnis on May 5, 1983 with regard to a workmen's compensation claim, Hughes Aircraft Company had already filed a claim

on or about April 21, 1983, without my permission, consent or knowledge and I was never so told on that date about that claim. I told the agent of the insurance company with regard to workmen's compensation benefits that I was not going to file a claim for workmen's compensation benefits and that statement that I was not going to file such a workmen's compensation claim was confirmed in a letter to me, attached hereto and marked Exhibit A.

20. If required by law, I would consider an offset of any benefits paid.

Further, the Affiant saith not.

//s// Albert N. Flores

STATE OF COLORADO)
)
COUNTY OF ARAPAHOE

Subscribed and sworn to before me this 20th day of October, 1986, by Albert N. Flores.

Witness my hand and official seal.

My commission expires: 10-18-88

//s// Karen E. Stone
Notary Public
26 West Dry Creek Circle, #575
Littleton, Colorado 80120

July 9, 1987

Clerk
U.S. District Court
1929 Stout Street
Denver, CO 80294

RE: Flores v. United States
Civil Action No. 84-JM-2431

Dear Clerk:

With reference to the Courts' Memorandum Opinion and Order" filed in this case on July 6, 1987, I wish to point out a possible factual error in the Court's opinion. In the first paragraph of page 2, the Court recites certain undisputed facts. This recitation appears to be correct. However, on page 3, paragraph 2, line 4, the Court states "However, Hughes Aircraft did provide a lunch facility on the base for the use of its employees, and Flores was planning on using that facility on the day he was injured."

It is correct that Hughes Aircraft did provide a lunch facility at the ADF; however, he did not use that facility on the day he was injured, but elected to go to the Buckley dining hall just outside the ADF perimeter and fell in the ADF parking lot en route to the Buckley dining hall.

Because of the possibility of an appeal in this case, if the Court concurs that the sentence referred to is in error or confusing, it is respectfully requested that the Court clarify its order to preclude any controversy over this matter in the Court of Appeals.

Sincerely,

JAMES W. WINCHESTER
Assistant U.S. Attorney

cc: A. Gary Bell

JWW/ls